Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1995

R.J. Steichen & Company and John E. Feltl,

Petitioners,

vs.

Brian L. Honn,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act ("FAA"), 9 U.S.C. §16(a), governs the right to appellate review of an order for vacatur, remand and rearbitration of a National Association of Securities Dealers arbitration award and preempts conflicting state law that precludes appellate review of an order for vacatur, remand and rearbitration.

LIST OF PARTIES

All parties to this Petition are listed in the caption.

RULE 29.1 LIST

There is no parent or subsidiary company to list.

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

INTRODUCTION

Petitioners, R.J. Steichen & Company and John E. Feltl, (collectively referred to as "Steichen") pray that this Court issue a Writ of Certiorari to review the orders of the Minnesota Supreme Court and the Minnesota Court of Appeals refusing to review an order of the Hennepin County District Court vacating and remanding for rearbitration a National Association of Securities Dealers ("NASD") arbitration award.

OPINIONS BELOW

On September 2, 1994 the NASD served an arbitration award on Steichen and Respondent Brian L. Honn ("Honn"), which is included in the Appendix as Exhibit A. (A-1 through A-6). The Hennepin County District Court denied Steichen's motion for confirmation of the award and granted Honn's motion for vacatur and remand for rearbitration in a memorandum and order dated January 20, 1995, which is included in the Appendix as Exhibit B. (A-7 through A-14). Steichen appealed the order denying confirmation and granting vacatur and remand for rearbitration to the Minnesota Court of Appeals on February 2, 1995 and on February 8, 1995 the Court of Appeals issued an order citing Minn. Stat. §572.26 subd. 1(5) as a basis for questioning appellate jurisdiction, which is included in the Appendix as Exhibit C. (A-15 through A-17). On March 7, 1995 the Minnesota Court of Appeals issued an order holding that the Federal Arbitration Act (FAA) 9 U.S.C. §16(a) "does not control the process by which substantive rights pertaining to arbitration are reviewed in state court", which is included in the Appendix as Exhibit D. (A-18 through A-20). On April 5, 1995 Steichen petitioned the Minnesota Supreme Court for review of the decision of the Court of Appeals and on April 27, 1995 the Minnesota Supreme Court issued an order denying Steichen's petition for further review, which is included in the Appendix as Exhibit E. (A-21).

STATEMENT OF JURISDICTION

The order of the Minnesota Supreme Court denying discretionary review was entered on April 27, 1995. This Petition for Writ of Certiorari is filed within ninety days of that date. U.S. Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C §1257 to review the order of the Minnesota Supreme Court by Writ of Certiorari.

Steichen disputes the validity of Minn Stat. §572.26 subd. 1(5), that precludes appellate review of the vacatur and remand for rearbitration of a NASD arbitration award; the validity of Minn. Stat §572.26 subd. 1(5)[1] is questionable under the Supremacy Clause and under the FAA, 9 U.S.C. §16(a). This Court found appellate jurisdiction[2], for example, in *Volt Information Sciences, Inc. v. Leland Stanford, Jr. U.*, 489 U.S. 468 (1989), when the validity of a California statute was drawn in question as repugnant to federal law. In *Volt* the California Court of Appeals sustained California law notwithstanding its potential conflict with the FAA and invalidity under the Supremacy clause. 489 U.S. at 473 n.4. This case resembles *Volt* albeit different provisions of the FAA are implicated.

The jurisdictional requirement of finality contained in 28 U.S.C. §1257 is also satisfied in this case. The Minnesota Supreme Court's final determination that no federal right of appellate review of the vacatur is "final" because requiring rearbitration before appellate review renders that right a nullity. *See, e.g., Pennsylvania v. Ritchie*, 480 U.S. 39, 47-48 (1987) ("where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had....")(*quoting Cox Broadcasting v. Cohn*, 420 U.S. 469, 481 (1975)); *N.Y. Times v. Jascalevich*, 439 U.S. 1317, 1318-19 (1978). Put differently, Steichen asserts that the FAA confers a substative right of appellate review of an order for vacatur, remand and

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[1] And all other similar versions of §19 of the Uniform Arbitration Act. *See Infra* at 6 n.5.

[2] Jurisdiction in *Volt* was appellate and premised on 28 U.S.C. §1257(2) (1988) which has since been amended. 489 U.S. at 473 n.4 Jurisdiction in this case can only be via certiorari; nevertheless, the standards for certiorari under the current version of 28 U.S.C. §1257 are parallel to those standards that provided a basis for this Court's appellate jurisdiction in *Volt*.

rearbitration and the Minnesota appellate courts have decided that Steichen has no such right.

STATUTES INVOLVED

The FAA, 9 U.S.C. §16(a) provides as follows:

> An appeal may be taken from –
>
> (1) an order –
>
> (A) refusing a stay of any action under §3 of this title,
>
> (B) denying a petition under §4 of this title to order arbitration to proceed,
>
> (C) denying an application under §206 of this title to compel arbitration,
>
> (D) confirming or denying confirmation of an award or partial award, or
>
> (E) modifying, correcting or ***vacating*** an award;

9 U.S.C. §16(a)[3] (Emphasis added).

The FAA also provides in pertinent part that as follows:

> If the parties in their agreement have agreed that a ***judgment of the court*** shall be entered upon the award pursuant to the arbitration, and shall ***specify the court***, then at any time

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[3] Section 16 of the FAA was enacted in 1988 as part of the Judicial Improvements and Access to Justice Act Pub.L.No. 100 - 702, Title X, §1019(a), 102 Stat.4671 (1988). Presumably, given the similarity between the UAA and the FAA, Congress was cognizant of the inconsistency between Section 16 of the FAA, 9 U.S.C. §16(a)(1)(E) and Section 19 of the UAA.

> within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such and order unless the award is vacated, modified or corrected as prescribed in §§10 and 11 of this title. ***If no court is specified in the agreement of the parties then such application may be made to the United States Court in and for the district within such an award was made.***

9 U.S.C. §9 (Emphasis added).[4]

The Minnesota Uniform Arbitration Act ("MAA") provides in pertinent part as follows:

> An appeal may be taken from:
>
> (1) An order denying an application to compel arbitration made under §572.09;
> (2) An order granting an application to stay arbitration made under §572.09 (b);
> (3) An order confirming or denying confirmation of an award;
> (4) An order modifying or correcting an award;
> (5) ***An order vacating an award without directing a rehearing;*** or

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[4] Notwithstanding the last sentence contained in 9 U.S.C. §9, the FAA has never been construed to provide an independent basis for federal court jurisdiction. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983).

(6) A judgment or decree in or pursuant to the provisions of this chapter.

Minn. Stat. §572.26 subd. 1[5] (Emphasis added).

Minn. Stat. §§572.18-.25 govern post-arbitration motion practice and do not specify which court has jurisdiction. Minn. Stat. §572.25 provides that venue is appropriate in "the court of the county in which the arbitration hearing shall be held...." Finally, Minn. Stat. §572.24 defines the term court to mean "***any court of competent*** jurisdiction of this state." (Emphasis added).

STATEMENT OF CASE

Honn initiated a NASD[6] arbitration against Steichen on June 21, 1993. (*See* Appendix at A-2). Honn's Statement of Claim asserted common law claims of fraud, breach of contract, promissory estoppel, defamation, interference with prospective business advantage, civil conversion, violation of the NASD rules of fair practice and failure to pay commissions pursuant to Minn. Stat. §181. 145. (*Id.* at A-2 through A-3). Almost one year later,

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[5] The MAA is derived from the Uniform Arbitration Act (UAA) which was drafted in 1955, and is enacted in some form in at least thirty-four (34) of the fifty (50) states and in the District of Columbia. Minnesota's version of the UAA was enacted in 1957. *See* 1957 Minn. Laws Chapter 633.

[6] The NASD is a federal self-regulatory organization ("SRO") established pursuant to the 1938 Maloney Act amendments to the 1934 Act. 15 U.S.C. 78 (o)3. The NASD arbitration rules are subject to the approval of the Securities and Exchange Commission ("SEC") under Section 19 of the 1934 Act. 15 U.S.C. 78 (s)(d)(1) and 17 C.F.R. 240.19b-4. *See also Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 234 (1987)("In the exercise of its ***regulatory authority***, the SEC has ***specifically approved*** the arbitration procedures of the New York Stock Exchange, the American Stock Exchange and the NASD....")(emphasis added).

on June 7, 8, and 9th and 16th of 1994, a three member panel appointed by the NASD heard the arbitration. (*Id.* at A-2). Honn alleged damages and requested an award in excess of one million dollars.

On September 2, 1994, the panel awarded Honn $7,312.50 for his claim of unpaid commissions under Minn. Stat. §181.145. (*Id.* at A-4 through A-5). The panel denied all of Honn's other claims. (*Id.*). Honn moved to vacate while Steichen moved to confirm the award in Hennepin County District Court. On December 15, 1994 the Honorable Delila F. Pierce heard oral arguments; she filed her order vacating the arbitration award on January 20, 1995.

Honn's motion to vacate asserted that the testimony of an NASD official, who had no professional or personal connection to the arbitrators, resulted in evident partiality under Minn. Stat. §572.19 subd. 1(2) ***and*** 9 U.S.C. §10(b). (A-9 through A-11). Honn also argued that nearly every other statutory basis contained in the MAA and the FAA supported vacatur. (*Id.*) In support, Honn offered the following: (a) His attorney's affidavit containing her opinion testimony; (b) his own affidavit replete with hearsay; (c) a partial transcript of approximately five minutes of the three and one-half day hearing; and (d) other assorted documents. Honn and Steichen both relied upon the FAA and cases interpreting that statute with respect to the substantive legal issues argued before Judge Pierce. In addition, Judge Pierce also relied upon the FAA in vacating and remanding the award for rearbitration and ordered a new panel. (*Id.* at A-11).

In vacating and ordering rearbitration of Honn's claims, Judge Pierce did not specifically identify the state or federal statutory provisions that provided a court with the authority to vacate an arbitration award under a "fundamentally fair"

standard.[7] (A-44). Judge Pierce's order implied that evident partiality (as opposed to actual bias)[8] existed even though there was no showing of any nexus between the "facts" allegedly providing a basis for a finding of evident partiality and the arbitrators.

On February 2, 1995 Steichen appealed the Order denying confirmation of the award and vacating and remanding this case to a different panel for arbitration.[9] Steichen's Statement of Case referenced the FAA and MAA as "statutes at issue".

On February 8, 1995 the Minnesota Court of Appeals issued an Order citing Minn. Stat. §572.26 subd. 1(5) as a basis for questioning jurisdiction for this appeal. (A-40). The parties filed jurisdictional memoranda on February 21, 1995 (A-42); Steichen contemporaneously filed a Petition for Discretionary Review. (A-49). In response to the Minnesota Court of Appeals' jurisdictional inquiry, Steichen asserted that it should not be forced to rearbitrate Honn's claims before appellate review of the vacatur and that to the extent the MAA limited appellate review of vacatur, the FAA preempted the MAA. On March 7, 1995, the Minnesota Court of Appeals issued an Order holding that the FAA "does not control the process by which substantive rights pertaining to arbitration are reviewed in state court. *See Xaphes v. Mowry*, 478 A.2d 299, 301 (Me. 1984); *Balton v. Green*, 801

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[7] Judge Pierce held the judicial standard of review of arbitration procedures was whether a party was denied a fundamentally fair hearing. (A-14)

[8] The distinction between evident partiality and actual bias is best described in *Schmitz v. Zilveti*, 20 F.3d, 1043, 1047 (9th Cir. 1994). *See also Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 147 (1968); *Peoples Sec. Life Ins. v. Monumental Life Ins.*, 991 F.2d 141, 146 (4th Cir. 1993).

[9] Judge Pierce ordered rearbitration by non-Minnesota arbitrators; this aspect of the trial court's ruling is anomalous inasmuch as Honn never asserted, anywhere in his motion for vacatur, that the fact that the arbitrators were Minnesota residents was a basis for partiality.

S.W.2d 923, 930 (Tex. App. 1990)." (*See* Appendix at A-19). On April 27, 1995, the Minnesota Supreme Court denied Steichen's Petition for Further Review.

REASONS FOR GRANTING THE WRIT

Arbitration is assuming ever increasing prominence as a means of resolving commercial disputes, particularity in the securities[10], construction[11], and employment[12] arenas. Under this Court's previous decisions, neither Steichen nor Honn had any choice of fora for resolving their dispute. In *Shearson / American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and its progeny,[13] Steichen was obligated under the FAA and the bylaws of the NASD to arbitrate Honn's claims. Similarly, this Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) and *Perry v. Thomas*, 482 U.S. 483 (1987), dictate that Honn was obligated to arbitrate his claims against Steichen. *See also Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 797-98

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[10] In 1993, more than 6,500 securities arbitrations were filed. Masucci, NASD Arbitration 1994, (Minnesota Institute of Legal Education March 10, 1995). Of these, 83% were with the NASD. The NASD expects these numbers to continue increasing. *Id.* In fact, the number of securities cases submitted to arbitration has increased 250% annually since 1987 and a parallel increase has occurred in commercial arbitration since 1972. Pierce, *The Federal Arbitration Act: Conflicting Interpretation of its Scope*, 61 CIN.L. REV. 623, 623 (1992).

[11] In 1993, the AAA heard 4,098 construction arbitration disputes with total claims and counterclaims of almost 1 billion dollars. *See* Thomson, *Arbitration Theory and Practice: A Survey of AAA Construction Arbitrators*, 23 HOFSTRA L. REV. 137, 138 n.6 (1994).

[12] In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) this Court found an agreement to arbitrate age discrimination claims in a securities registration application.

[13] *See also Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 482-84 (1989) (holding '33 Act claims arbitrable).

(Minn. 1995). With the growing use of arbitration as a mandatory or an elective method of dispute resolution, more and more courts are confronted with issues relating to confirmation, modification and vacatur of arbitration awards. This case represents the post-arbitration conundrum courts and counsel face because of the absence of any guidance as to what statutes (federal or state) govern the enforcement and appellate review of arbitration awards involving interstate commerce.

A Writ of Certiorari should be granted in this case for two reasons. First, while this Court has held that the FAA preempts state law that discourages arbitration, this Court has never addressed the preemptive effect of the FAA in the context of post-arbitration procedure. This Court's past decisions construing the FAA were confined to pre-arbitration procedure and to the enforcement of arbitration agreements.[14] Furthermore, neither the FAA, the UAA, or Submission Agreements used to submit matters to arbitration dictate which law applies to enforcement of and appellate review of aribtration awards. Second, an explicit conflict exists between the MAA (and obviously all other jurisdictions that have adopted the UAA) and the FAA that is not merely academic or episodic. This Court should clarify the

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[14] The vast majority of this Court's decisions relating to FAA preemption of state law concern the choice between litigation or arbitration. *See, e.g., Allied-Bruce Terminix Co., Inc. v. Dobson.*, 115 S.Ct. 834 (1995) (state courts cannot apply statute that invalidates arbitration agreements); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (FAA applied to enforce agreement to arbitrate contained in U-4); *Volt Information Sciences v. Leland Stanford, Jr. U.*, 489 U.S. 168 (1989) (stay of arbitration pending outcome of litigation); *Perry v. Thomas*, 482 U.S. 483 (1987) (statutory claim for wages under California labor law conflicted with arbitration clause); *Southland v. Keating*, 465 U.S. 1 (1984) (conflict between contractual arbitration clause and California Franchise Investment Law); *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1 (1983) (attempt to avoid or stay arbitration). This case does not involve such a conflict but rather concerns the integrity and enforcement of an arbitration award.

relationship between the UAA and the FAA and parties' rights in connection with post-arbitration practice in state and federal court.

1. Neither the contract nor the statutes involved provide any guidance as to which law applies.

This Court's decision in *Volt* found that the FAA did not preempt the California arbitration law. 489 U.S. at 478-79. In *Volt* this Court looked to the arbitration agreement itself to decide which law the parties intended to apply to the arbitration. *Id.* at 479. This case, however, raises the issue of what law applies in the absence of a contractual choice of law provision and in the absence of a statutory provision. In the end, this Court's decisions mandated arbitration in this and other NASD cases but neither the arbitration agreement, this Court's decisions, nor federal or state law provide specific guidance as to the rights pertaining to appellate review of arbitration awards.

The Uniform Submission Agreement generally used in NASD cases does not prescribe which law governs post-arbitration motion practice.[15] For instance, the agreement in this case provided as follows:

> 1. The undersigned parties hereby submit the present matter in controversy, as set forth in the attached

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[15] Neither does the submission agreement used in AAA securities or construction disputes. In construction disputes, however, the contract containing the mandatory arbitration clause also typically contains a choice of law provision. In the context of choosing between Texas and Minnesota, for example, such a provision would not be critical because both states are UAA jurisdictions. But the choice of law provision contained in such contracts does not resolve the issue discussed in Justice Brennan's dissent in *Volt*. 489 U.S. at 488. More specifically, these choice of law provisions resolve state law conflicts, but do not resolve a conflict between state and federal law. *Id.*

statement of claim, answers, and all related counterclaims and/or third party claims which may be asserted, to arbitration in accordance with the Constitution, Bylaws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organizations.

2. The undersigned parties hereby state that they have read the procedures and rules of the sponsoring organization relating to arbitration.

3. The undersigned parties agree that in the event a hearing is necessary, such hearing shall be held at a time and place as may be designated by the Director Arbitration or the arbitrator(s). The undersigned parties further agree and understand that the arbitration will be conducted in accordance with the Constitution, Bylaws, Rules, Regulations and/or Code of Arbitration Procedure of the sponsoring organization.

4. The undersigned parties further agree to abide by and perform any award(s) rendered pursuant to the this Submission Agreement and further agree that a ***judgment*** and any interest due thereon, may be entered upon such award(s) and, for these purposes, the undersigned parties hereby voluntarily consent to submit to ***the jurisdiction*** which ***may properly*** enter such judgment.

5. **IN WITNESS WHEREOF**, the parties hereto have signed and acknowledge the foregoing Submission Agreement.

(Emphasis added).

In contrast to cases like *Volt*, the language of the contract or uniform submission agreement does not generally provide guidance to courts or parties involved in post NASD arbitration motion practice[16]. Presumably, because this Court has held that many of the disputes that arise in the securities industry must be arbitrated under the FAA, then the FAA should govern appellate review of post-arbitration motion practice.

Nevertheless, neither the FAA nor the UAA clearly prescribe the applicable governing law. *See supra* at 4-6. The general philosophy of the UAA is to minimize judicial involvement. This philosophy considers a remand to rearbitration as interlocutory and therefore not reviewable. The FAA, however, recognizes that vacatur and remand to a different arbitration panel favors litigation, not arbitration, because vacatur and remand set aside a final arbitration award. As the Fifth Circuit Court of Appeals observed in *Forsythe International, SA v. Gibbs Oil Co.*, 915 F.2d 1017 (5th Cir. 1990):

> While the district court's order commanded further arbitration, it also nullified the decision of an arbitration panel. If an order remanding the case to a different panel renders a vacatur unreviewable, parties to an arbitration could never determine whether the district court acted within its narrow statutory limits governing vacatur of the original award. ***Such a result would disserve the policies that promote arbitration and restrict judicial review of awards.***

915 F.2d at 1020 (emphasis added, footnote omitted).

This strong federal policy favoring arbitration conflicts with the general principle disfavoring piecemeal litigation. MacNeil et al, IV FEDERAL ARBITRATION LAW §43.5.2 at 43.56

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[16] In *Volt* a specific choice of law clause was contained in the contract. 489 U.S. at 471-76.

(1994). When the issue of appealability is inextricably intertwined with a substantive issue, great advantages exist in "candidly deciding the merits rather than toying with them in a jurisdictional minuet." *Locals 2222, 2320 - 2327, Int'l Brotherhood of Electrical Workers v. New England Tel. & Tel. Co.*, 628 F.2d 644, 646 (1st Cir. 1980)(LMRA §301)(citation omitted). This case and others like it that are certain to arise require a resolution of this conflict which is a direct result of the FAA and this Court's decisions interpreting the FAA.

2. A direct conflict exists between the FAA and UAA.

The conflict between the FAA and the UAA's provision that renders vacatur with remand nonappealable was directly addressed in *Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276 (5th Cir. 1994). In *Atlantic* the plaintiff brought suit in state court to modify, correct and confirm an arbitration award. 11 F.3d at 1278. The defendant removed the case to federal district court on the basis of diversity jurisdiction and counterclaimed for vacatur and remand. *Id.* The trial court found the award unenforceable and remanded the matter for arbitration before a new panel. *Id.*

On appeal, it was asserted that the Fifth Circuit lacked appellate jurisdiction because the contract containing the arbitration agreement provided that the "arbitration award 'shall be reviewable only as provided for under the Uniform Arbitration Act.'" 11 F.3d at 1279 n.5.[17] The Fifth Circuit rejected this argument relying on *Southland* and held that the provisions of the FAA governed its jurisdiction even in a diversity suit.

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[17] Under the UAA and MAA, an order for vacatur and remand is not appealable. *See* §19 UAA; Minn. Stat. §572.26 subd. 1(5).

> If an arbitration agreement is within the coverage of the FAA, its provisions are ***applicable in state*** as well as federal court. (citations omitted).
>
> * * *
>
> Furthermore, the FAA governs judicial review of arbitration proceedings ***notwithstanding any choice of law provision or state law to the contrary.***

11 F.3d 1280 (emphasis added) (*citing Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243-44 (5th Cir. 1986) and *Northern Illinois Gas Co. v. Airco Industries Gases*, 676 F.2d 270, 274-75 (7th Cir. 1982)).[18] In the final analysis, *Atlantic* represents the confusion that *Volt* and *Southland* created and the problems that Justice Brennan identified in his dissent in *Volt*. 489 U.S. at 488. Arguably, *Atlantic* was decided wrongly under this Court's reasoning in *Volt* which would have held that the choice of law provision contained in the contract governed. Nevertheless, the *Atlantic* decision failed to cite *Volt* and instead relied on *Cone* and *Southland* which were both decided before *Volt*. 11 F.3d at 1280.

Because this Court has held that the FAA is a body of substantive law to be applied in state and federal courts and that the FAA governs agreements to arbitrate contained in U-4 applications, then so too must the FAA, when applied in state court, govern the appellate review of judicial vacatur of arbitration awards. Failure to clarify and harmonize the express statutory conflict that exists could give rise to post-arbitration motion practice forum shopping.

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[18] The *Atlantic* opinion also cited to Wright & Miller who observe that: "[E]ven in a diversity suit or an action in state court if a maritime transaction or one in interstate or foreign commerce is involved, the substantive rules contained in the [FAA]...*are to be applied regardless of state law*." 13 B C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, §3569 (2nd Ed. 1984) (emphasis added).

The *Atlantic* decision, as it relates to 9 U.S.C. §16, conflicts with the Texas Court of Appeals decision in *Balton v. Green*, 801 S.W.2d 923 (Tex. App. 1990) and the Maine Supreme Court's decision in *Xaphes v. Mowry*, 478 A.2d 1299 (Me. 1984). Notwithstanding the language in *Southland* that the substantive law contained in the FAA applies in both state and federal court, appellate courts in Maine, Texas, and, now, Minnesota have held that 9 U.S.C. §16(a) is merely procedural. *See Xaphes*, 478 A.2d at 301; *Balton*, 801 S.W.2d at 930. *But see A.G. Edwards & Sons, Inc. v. Clark*, 558 So.2d 358 (Ala. 1990) (holding that FAA, 9 U.S.C. §16, applied to an order denying a stay of litigation and refusing to compel arbitration and that such an order was appealable).[19] Thus, not only is there an explicit conflict between the FAA and the UAA as enacted in over two-thirds of the states, but there is a conflict between federal and state courts as to the applicability of 9 U.S.C. §16(a) in state court.

The interpretation of 9 U.S.C. §16 has also given rise to a conflict between the Second, Third and Fifth Circuits. In *Landy Michael Realty Corp. v. Local 32B - 37J*, 954 F.2d 794 (2nd Cir. 1992), the vacatur and remand of the damages portion of an arbitration award was held to be nonappealable regardless of the unqualified language contained in 9 U.S.C. §16(a). 945 F.2d at 797.[20] *But see Virgin Islands Housing Authority v. Coastal Gen. Const.*, 27 F.3d 911, 914 (3rd Cir. 1994) (following Fifth Circuit's decisions in *Atlantic* and *Forsythe*)

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[19] Alabama is not a UAA jurisdiction.

[20] *Landy* relied in part, on *Shearson Loeb Rhoades, Inc. v. Much*, 754 F.2d 773 (7th Cir. 1985). 954 F.2d at 797. But *Much* was decided before 9 U.S.C. §16 was enacted and therefore has no precedential value. Moreover, *Much* suggested in *dicta* that, as in this case, vacatur and remand on the basis of partiality was final, not interlocutory, and therefore appealable. 754 F.2d at 778 n.4.

CONCLUSION

The standards by which arbitration awards are measured, as well as the timing of that judicial measurement, directly affects the integrity of the arbitral process. Having fully embraced arbitration as an effective and efficient means of resolving disputes, after years of skepticism, this Court must define and clarify the rights related to judicial enforcement of and appellate review of arbitration awards.

The notion that vacatur and remand of an arbitral award without further appellate review fosters and encourages the use of arbitration as a dispute resolution tool is superficially appealing but logically nonsensical. Obviously, it is not favorable to arbitration of disputes arising in interstate commerce if the means of judicial review and enforcement of such awards is dependant upon the procedural vagaries of a particular jurisdiction. Characterizing 9 U.S.C. §16(a) as procedural, when this Court has previously held that the FAA is a body of substantive law, imposes the problems resolved in *Erie v. Tompkins*, 304 U.S. 64 (1938) upon the arbitral process. In sum, this case gives this court an opportunity to provide guidance to state and federal courts and to reconcile and harmonize this Court's holdings in *Volt* and *Southland*.

Based on the foregoing, Steichen respectfully requests this Court to issue a Writ of Certiorari to the Minnesota Supreme Court.

Dated: July 24, 1995

Steven E. Rau
701 Fourth Avenue South
Suite 500
Minneapolis, Minnesota 55415

COUNSEL FOR PETITIONERS
R.J. STEICHEN & COMPANY
AND JOHN E. FELTL

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EXHIBIT A

N.A.S.D. AWARD

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

In the Matter of the Arbitration Between

Name of Claimant

Brian L. Honn

93-02443

and

Name of Respondents

R.J. Steichen and Company and John E. Feltl

REPRESENTATION OF PARTIES

Claimant, Brian Honn ("Honn") was represented at the hearing by Rebecca E. Bender, Esq. of Rebecca E. Bender & Associates P.A., Minneapolis, Minnesota.

Respondents, R.J. Steichen and Company ("Steichen") and John E. Feltl ("Feltl") were represented at the hearing by Steven E. Rau, Esq. of Maun & Simon, Minneapolis, Minnesota.

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

Honn also alleged that Steichen and Feltl committed the following violations: violation of Min. Stat. Section 181.145; breach of contract, misrepresentation; promissory estoppel; defamation; interference with business; and civil conversion/violation of NASD Rules of Fair Practice.

Respondents Steichen and Feltl generally denied the allegations set forth in the Statement of Claim. Steichen and Feltl stated that they did not make any misrepresentations and did not unlawfully withhold any money or securities from Honn. Steichen and Feltl also stated that training was offered to Honn, but was not mandatory. Steichen and Feltl stated that the U-5 was not defamatory.

RELIEF REQUESTED

Claimant Honn requested the following: commission amounts, damages due to Respondents breach of contract, damages plus penalties pursuant to Minn. Stat. Sec. 181.145, damages caused by the negligent and/or fraudulent misrepresentations of Respondents, damages based on defamation, damages on a promissory estoppel theory of liability, damages due to Respondents civil conversion in violation of the NASD Rules of Fair Practice, damages due to Respondent's interference with his business; punitive damages, attorney's fees, pre-judgment interest, post-judgment interest, costs, filing and hearing fees and other disbursements, and other further or different relief as the panel deems just and equitable.

Respondents Steichen and Feltl requested that the Statement of Claim be dismissed with prejudice, and that they be awarded their costs and expenses, including attorney's fees and such other further relief as the panel may deem just and equitable.

4. Respondent R.J. Steichen shall be and hereby is liable for, and shall pay to the Claimant, damages for penalties in the amount of Two Thousand, Four Hundred Thirty Seven Dollars and Fifty Cents ($2,437.50) for violation of Minn. Stat. Sec. 181.145 as set forth in claimant's requested relief;

5. Respondent R.J. Steichen shall be and hereby is liable for, and shall pay to the Claimant, attorney's fees in the amount of Two Thousand, Four Hundred Thirty Seven Dollars and Fifty Cents ($2,437.50). The panel awarded attorney's fees under the authority of Minn. Stat. Sec. 181.145;

6. Respondent R.J. Steichen shall, in addition to the above, promptly cause to be prepared and filed with the N.A.S.D., CRD amendments to Claimant's form U-5 in accordance with the Rules of Fair Practice and consistent with factual information known by Respondent R.J. Steichen;

7. All other requests not specifically provided for herein are denied by the panel;

8. Each of the parties shall bear their own costs and expenses, other than those specifically enumerated for herein.

FORUM FEES

Pursuant to §43(c) of the N.A.S.D. Code of Arbitration Procedure, the National Association of Securities Dealers, Inc. ("N.A.S.D.") shall retain the non-refundable filing fee in the amount of $500.00 and shall retain as forum fees the hearing session deposit in the amount of $750.00 previously deposited with the N.A.S.D. by the Claimant.

EXHIBIT B

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Plaintiff, ORDER AND MEMORANDUM
File No. CT 94-15904

v.

R.J. Steichen and Company
and John E. Feltl,

Defendants.

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court, on the 15th of December, 1994, on Plaintiff's motion to vacate arbitrators, award and Defendants' motion to confirm arbitration award at the Hennepin County Government Center, Minneapolis, Minnesota.

Rebecca E. Bender, Esq. appeared for and on behalf of Plaintiff; Steven E. Rau, Esq. appeared for and on behalf of Defendants.

Now, therefore, based on the files, records and proceedings and the arguments of counsel:

MEMORANDUM

Facts

This matter comes before the Court on Plaintiff's motion to vacate the arbitrators' decision in the National Association of Securities Dealers, Inc. (NASD) arbitration captioned Brian L. Honn v. R.J. Steichen and company and John E. Feltl, NASD Case No. 9302443, and on Defendants' motion to confirm same.

Plaintiff, a securities broker, brought an action against his former employer, R.J. Steichen and Company (R.J. Steichen), a brokerage firm, and its president/owner John E. Feltl, for defamation, breach of contract and misrepresentation, after Plaintiff had voluntarily left the employment of R.J. Steichen.

Brokers are required, under the Rules of the NASD, to have their claims decided by an NASD arbitration panel. Therefore, the case was heard by a panel of arbitrators appointed by the NASD. The NASD panel awarded Plaintiff $7312.50 together with pre-judgment interest against Defendants.

Defendants allege that Plaintiff's discontent with the award is the underlying reason for his motion to vacate the decision and re-litigate his claims. Defendants contend that Plaintiff availed himself of all of the advantages of arbitration until Plaintiff received an award with which he was dissatisfied. Defendants also claim that at the end of the arbitration, all parties agreed that they had received a fair and impartial hearing on the issues. Defendants contend that because Plaintiff has received a fair hearing, this Court should confirm the NASD arbitrators' award.

Plaintiff, however, argues that the arbitration proceeding was unfair. Plaintiff contends that the arbitrators' award was procured by corruption, fraud or other undue means. In addition, Plaintiff claims that there was evident partiality and

Minn. Stat. §572.19.

The Minnesota statutory section is modeled after 9 U.S.C. §10 of the Federal Arbitration Act. 9 U.S.C. §10 provides in relevant part:

> In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
>
> 1. Where the award was procured by corruption, fraud or undue means;
>
> 2. Where there was evident partiality or corruption in the arbitrators, or either of them;
>
> 3. Where the arbitrators were guilty of misconduct... in any misbehavior by which the rights of any party have been prejudiced; or
>
> 4. Where the arbitrators exceeded their powers.

9 U.S.C. §10. Any one of these individual findings is sufficient, in and of itself, to vacate the arbitrators' award.

The standard of judicial review of arbitration procedures is whether a party to an arbitration has been denied a fundamentally fair hearing. See Baar v. Tigerman, 140 Cal. App. 3rd 979 (Cal. 1983).

The test to be applied is that of a reasonable person. More specifically, an arbitration award must be vacated upon a finding of "evident partiality," which exists "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Local 814 Internat'l Bd. of Teamsters v. J & B Installer & Moving, Inc.,

received an official response regarding the validity of this testimony from Schief. In that letter, Schief stated that "[t]he NASD has a long-standing policy not to provide staff persons as so-called expert or technical witnesses in private litigation or in arbitration proceedings."

This letter makes clear that the NASD does not approve of its employees testifying in arbitration matters. In this case, the NASD overstepped their own policies and rules. The court therefore finds that allowing an NASD official to testify in the arbitration proceeding was unfair and therefore prejudiced the Plaintiff.

Plaintiff's also contend that the proceeding was corrupted by the NASD coordinator requesting a job from the securities industry panelist, James Kaiser, a former Paine-Webber manager.

The arbitration proceeding at issue concerned misrepresentation, defamation and breach of contract and thus in accordance with the NASD Rules, two persons not affiliated with the securities industry and one person designated as an affiliate of the securities industry, were chosen to decide the dispute between the parties.

Apparently, during a break in the arbitration hearing, Sharon Kranz, the Chicago NASD Case Administrator was talking to James Kaiser, the securities industry arbitrator on the panel. Kranz, a representative of the impartial sponsoring entity, was discussing with Kaiser whether Kaiser knew of any jobs for her in the securities industry.

It is the duty of the NASD Case Administrator (Kranz) to see that the hearings are conducted in an impartial manner. It therefore follows that she must be an impartial source of information owing nothing to the industry. Clearly, there is too close of a professional connection between the NASD Case Administrator and the arbitration panel deciding a dispute for favors to be requested of a panel member.

EXHIBIT C

STATE OF MINNESOTA

IN COURT OF APPEALS

Brian L. Honn,

Respondent,

ORDER

vs.

#C5 95-256

R.J. Steichen and Company,

Appellant.

BASED UPON THE FILE, RECORD AND PROCEEDINGS, AND BECAUSE THERE IS A QUESTION WHETHER THIS COURT HAS JURISDICTION:

1. This appeal was filed February 2, 1995.

2. Appellant seeks review of a January 20, 1995 order granting respondent's motion to vacate the arbitrator's award and remanding the matter for rehearing by new arbitrators.

3. Appealable orders in arbitration proceedings are listed in Minn. Stat. § 572. Mivoi v. Gold Bond Stamp Co. Employees Retirement Trust, 293 Minn. 376, 378, 196 N.W.2d 309, 310 (1972). The statute provides that an appeal may be taken from an order "vacating an award without directing a rehearing." Minn. Stat. § 572.26, subd. 1(5)

jurisdictional issue raised, the failure to dismiss the appeal may result in the imposition of sanctions against counsel. See Radloff v. First Am. Nat'l Bank of St. Cloud, 470 N.W.2d 154 (Minn. App. 1991); Swenson v. City of Fifty Lakes, 439 N.W.2d 758 (Minn. App. 1989); Lund v. Corporate Air, Inc., 438 N.W.2d 458 (Minn. App. 1989), rev'd in part (Minn. June 21, 1989).

5. This order does not stay or extend briefing deadlines or other procedural requirements under the rules.

Dated: February 8, 1995

BY THE COURT

s/Anne V. Simonett
Chief Judge

AW/blm

(1994); Metropolitan Airports Comm'n v. Metropolitan Airports Police Federation, 443 N.W.2d 519, 523 (Minn. 1989). We decline to construe Minn. Stat. § 572.26, subd. 1(3) as allowing an appeal from any order denying confirmation of an award because it appears the legislature intended to limit appeals from orders vacating awards to situations where no rehearing is directed. See Minn. Stat. § 645.17(2) (1994) (presumption that the legislature intends the entire statute to be effective and certain).

Appellants argue that Minn. Stat. § 572.26, subd. 1(5) is preempted by the Federal Arbitration Act (FAA) because the FAA allows an appeal from an order vacating an award, regardless of whether a rehearing is directed. See 9 U.S.C.A. § 16(a)(1)(E) (West Supp. 1994). We hold that the FAA does not control the process by which substantive rights pertaining to arbitration are reviewed in state court. See Xaphes v. Mowry, 478 A.2d 299, 301 (Me. 1984); Batton v. Green, 801 S.W.2d. 923, 930 (Tex. App. 1990).

Appellants have not established a compelling reason for review of the January 20 order. See Mivoi v. Gold Bond Stamp Co. Employees Retirement Trust, 293 Minn. 376, 378, 196 N.W.2d 309, 310 (1972) (declining to grant discretionary review where nonappealable arbitration order did not expose the aggrieved party to irreparable damage).

IT IS HEREBY ORDERED:

1. The direct appeal (C5-95-256) is dismissed.

2. The petition for discretionary review (C2-95-392) is denied.

3. The Clerk of the Appellate Courts shall provide copies of this order to the Honorable Delila F. Pierce, counsel of record, and the court administrator.

EXHIBIT E

STATE OF MINNESOTA

IN SUPREME COURT

C5-95-256

Brian L. Honn,

Respondent,

vs.

R.J. Steichen & Company, et al.,

Appellants.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of R.J. Steichen & Company, et al. for further review be, and the same is, denied.

Dated: April 27, 1995

BY THE COURT:
s/ A.M. Keith

Chief Justice

ANDERSON, J. took no part in the consideration or decision of this case.